

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 WESTERN SECTION

4 Baystate Health, Inc.)
5) 20cv30042-MGM
6 vs)
7 Bay State Physical Therapy, P.C.) May 15, 2020
_____)

8
9 Telephone Hearing Held Before
10 The Honorable Mark G. Mastroianni
11 United States District Judge.

12 APPEARANCES:

13
14 On behalf of the plaintiff: James C. Duda, Bulkley,
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20 On behalf of the defendant: Lucy Jewett Wheatley,
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1 **(Telephone Hearing commenced at 9:31.)**

2 THE CLERK: The case we're hearing via telephone
3 this morning is Civil Matter 20-30042, Baystate Health,
4 Inc. versus Bay State Physical Therapy, PC, et al.

5 Counsel, I'm going to ask you to identify yourself
6 for the record please.

7 MR. DUDA: This is James Duda of Bulkley,
8 Richardson on behalf of plaintiff Baystate Health.

9 MS. WHEATLEY: And this is Lucy --

10 MS. BONZAGNI: Mary --

11 MS. OSTBERG: Lauren Ostberg is also here for
12 Baystate Health.

13 MS. BONZAGNI: Mary Bonzagni also here on behalf
14 of Baystate Health.

15 MS. WHEATLEY: This is Lucy Wheatley from
16 McGuireWoods representing the defendants Bay State
17 Physical Therapy, Bay State Physical Therapy of Randolph,
18 and Steven Windwer.

19 THE COURT: Okay. We survived the introductions
20 so let's go forward with this.

21 I'm familiar with the paperwork. Baystate Health,
22 why don't you walk me through your argument in support of
23 your request for an injunction and perhaps during your
24 argument I might stop you and ask you to clarify certain
25 points.

1 Go right ahead, Attorney Duda.

2 MR. DUDA: Thank you, Your Honor, and thank you
3 for hearing us today during these times.

4 Plaintiff Baystate Health, Inc. has a stable of
5 Baystate trademarks that are registered federally in
6 Massachusetts. It can claim protection for those marks
7 throughout Massachusetts and throughout the United States.
8 Those broader rights however are not at issue today.

9 Baystate is here today seeking very limited relief.
10 It is seeking only to have its rights to the Baystate
11 trademark under the common law be enforced immediately
12 only in its direct trade area.

13 It does not seek to prevent the defendants from
14 continuing to use Bay State Physical Therapy mark in
15 connection with its approximately 40 other facilities in
16 eastern Mass. and New Hampshire.

17 In effect, what Baystate is asking the court is to
18 prevent the use of that mark in a single facility in
19 Baystate's own back yard and a facility that opened only
20 recently.

21 In light of the scope and the basis of relief that
22 Baystate is seeking, the case law that is applicable to
23 this matter and squarely on point is provided by --

24 THE COURT: Tell me where are the -- the other
25 Bay State Physical Therapies are all located around the

1 Boston area?

2 MR. DUDA: Yes, they're all Worcester east.

3 THE COURT: They've been operating there for
4 some time?

5 MR. DUDA: Yes, Your Honor.

6 THE COURT: And what's been Baystate Health
7 Systems reach out into that area? Baystate Health Systems
8 isn't just located in the Springfield area?

9 MR. DUDA: Towards Worcester.

10 THE COURT: Tell me about that.

11 MR. DUDA: Yes, Your Honor. Baystate has
12 facilities throughout western Massachusetts. It's up in
13 Franklin County, Hampshire County, Hampden County and I
14 think as far as Ware, but they do not have any medical
15 facilities, provide medical care east of the western
16 border of Worcester County.

17 THE COURT: Okay. So there's nothing in
18 Worcester. It stops right at Worcester?

19 MR. DUDA: Yes, Your Honor.

20 THE COURT: All right. I thought that you might
21 have had some other types of -- some presence out in the
22 Worcester area, not Boston but getting into Worcester.
23 Okay. Thank you for clarifying.

24 MR. DUDA: Just to clarify to make sure that I
25 don't misspeak, there are a number of what are called

1 reference laboratories that Baystate has out in the
2 eastern part of the state, but those are just
3 laboratories. They don't have any medical facilities that
4 provide medical care in that direction.

5 THE COURT: But they're clearly offshoots of
6 Baystate Health?

7 MR. DUDA: They are owned by Baystate; they are
8 reference laboratories.

9 THE COURT: Okay. And Baystate Reference Labs
10 include going into Boston?

11 MR. DUDA: I believe so, yes, or at least around
12 the Boston area.

13 THE COURT: Okay. Thank you.

14 MR. DUDA: As I was saying, in the light of the
15 scope and the basis of relief that Baystate is seeking,
16 the case law that is applicable to the matter and we
17 believe is squarely on point is provided by two cases from
18 the First Circuit. One is Thrifty Rent-A-Car System v.
19 Thrift Cars and that's at 831 F.2d 1177, a citation from
20 1987. And then subsequently there's the Dorpan v. Hotel
21 Melia case, 728 F.3d 55, and that case is from 2013.

22 It's clear under those opinions that a senior user of
23 a mark in a defined area, a defined trade area has
24 superior rights to a junior user, registered or not, in
25 that same trade area. Both of those cases squarely hold

1 that.

2 The district court cases by which defendants rely,
3 both named Baystate Savings Bank v. Baystate Financial
4 Services, one from 2004 and one from 2007, did not and
5 could not alter the law established by Thrifty Rent-A-Car
6 in 1987 and then reaffirmed by Dorpan in 2013.

7 Under that law explained by Thrifty Rent-A-Car and
8 Dorpan, defendants had no right to use the Baystate name
9 in western Massachusetts to a registered Bay State
10 Physical Therapy design mark in April 2011.

11 It cannot be contested by that date that Baystate had
12 firmly established its Baystate mark in this trade area
13 for healthcare services including physical therapy.

14 In connection with that, I would point the court to
15 in particular Exhibit 38 which is an article about Wally
16 Garstka who received cardiac rehabilitation -- which I
17 don't think the defendants are going to claim does not
18 involve physical therapy -- after each of his medical
19 procedures at Baystate going back to 1994 and at page 30
20 of Exhibit 1 showing a 1999 state trademark registration
21 establishing that by 1996 Baystate had been using the
22 Baystate Rehabilitation care mark for "physical therapy"
23 among other things.

24 While this case is controlled by Thrifty Rent-A-Car
25 and Dorpan, it is not about cars and hotels. This case is

1 about medical care and it comes in lieu of a pandemic.

2 This case is about being sure that a patient does not
3 go into a for-profit treatment facility undergoing rapid
4 corporate expansion with the belief that he or she is
5 entering a care facility under the control of a trusted,
6 well-respected, nonprofit medical organization with strict
7 oversight procedures to protect the patient's health.

8 This is not where a mistake and you should get a bad
9 car; this is where a mistake now can literally mean the
10 difference between life and death.

11 Bay State Physical Therapy is a for-profit
12 corporation that has continued to operate throughout the
13 pandemic. Baystate Health has no control over the
14 procedures that Bay State Therapy is using to protect its
15 patients. It has no control on the nonessential
16 procedures; it has no control on any contact; it has no
17 control over how Bay State Physical Therapy treats its
18 patients.

19 If as a result of Bay State Physical Therapy's
20 procedures a patient who -- if his or her treatment was
21 subject to the oversight of Bay State becomes sick and
22 dies, that would be truly irreparable harm. The harm to
23 the patient is obvious. The harm to Baystate when the
24 Springfield Republican headline reads Patient contracts
25 COVID-19 at Bay State Physical Therapy will also be truly

1 irreparable.

2 I use the COVID-19 example because its repercussions
3 are clear. The same holds true for any procedure at Bay
4 State Physical Therapy. The risk both to confuse patients
5 to Baystate in connection with any such procedure are
6 clear. Trademark infringement damages are unlike other
7 harms.

8 THE COURT: What are you telling me about the
9 likelihood of confusion? You're basing that simply on the
10 name, the Bay State -- that Bay State name only? Is there
11 anything about the design of their website or their emblem
12 or the logo or their business model, a sign in their
13 windows, anything else that makes it look like there could
14 be confusion?

15 MR. DUDA: Well, Your Honor, I think we
16 mentioned somewhat in our briefing if you go to their
17 website, you will see occasions where a patient is quoted
18 as saying -- as referring to Bay State Physical Therapy I
19 think as Baystate.

20 I've noticed -- it's not in our papers because I just
21 found it. There's a March 20, 2020 Bay State Physical
22 Therapy COVID-19 update that's on its website. This March
23 20, 2020 document twice uses the term Bay State without
24 anything else. "Bay State is transitioning lower acuity
25 and routine visits. Safety of our patients and team

1 members is paramount to Bay State," and we also believe
2 that we (inaudible).

3 So it's not an issue of design. The fact is using
4 the term Bay State either alone --

5 THE COURT: Christina, are you still there?

6 MR. DUDA: Yes, I'm still here.

7 THE CLERK: I am. Judge?

8 THE COURT: Yeah, hello. I lost you guys for a
9 minute.

10 MR. DUDA: I'm sorry.

11 THE CLERK: Okay.

12 THE COURT: Christina, could everyone still hear
13 the attorney talking?

14 THE CLERK: Yeah. Everyone can hear.

15 THE COURT: All right. I lost him for a good
16 10, 15 seconds.

17 MR. DUDA: I'm sorry. I think I had -- the
18 question, as I understood it, was there other -- did I
19 have other examples for discussion about how the term was
20 being used, and as I indicated that on the website you can
21 see references to Bay State used certainly outside of the
22 design mark. Sometimes used just as a word alone Bay
23 State as two words or Baystate as one word.

24 In one particular example which I indicated that can
25 be found on their website right now at Baystatept.com it's

1 an announcement press release from March 20, 2020. It's
2 Bay State Physical Therapy COVID-19 update, and twice in
3 this document on the first page it refers simply to Bay
4 State. "Bay State is transitioning lower acuity and
5 routine visits."

6 In the next paragraph, "The safety of our patients
7 and team members is paramount to Bay State," without even
8 the use of the tag line physical therapy and certainly
9 outside of the design mark.

10 We would say in any event that the addition of the
11 tag mark means very little since it's simply a generic
12 term and adds little to the use of the mark.

13 I've not gone through the various elements that we
14 had outlined in our brief as to showing likelihood of
15 confusion, but if the court would like we could.

16 THE COURT: Tell me -- we don't need to go
17 through all of them, but Bay State Physical Therapy, is it
18 one word or two words as compared to Baystate Health?

19 MR. DUDA: The Bay State for physical therapy is
20 two words and Baystate, our Baystate is one word. But for
21 purposes of what we're talking about, which is the
22 Baystate mark, it's just that's really the only difference
23 particularly when it's used as Bay State. And I think
24 it's clear from precedent and from the USPTO itself that
25 marks are judged by the way that they sound, the audio

1 impression of it that's the key.

2 THE COURT: Now what importance, if any, does
3 the negotiation -- or I shouldn't say negotiation, the
4 discussions between Baystate Health and Bay State Physical
5 Therapy going back to 2008? What, if any, import does
6 that have on now when Bay State Physical Therapy comes to
7 Springfield in 2019?

8 MR. DUDA: I think it has little significance
9 with what we're talking about right now, Your Honor, which
10 is the preliminary injunction.

11 I mean, there was an attempt -- I think for this
12 motion it's a bit of a side issue, but there was an
13 attempt to resolve this matter back in 2008 I guess and
14 discussions were had.

15 As indicated in our brief, it appeared that an
16 agreement was made that Bay State Physical Therapy would
17 stay east of the western boundary of Worcester and would
18 pay a fee. That agreement was never executed. The
19 parties did not agree in writing that that was going to
20 happen and the parties ended negotiations. But for the
21 next eleven years Bay State Physical Therapy stayed on the
22 other side.

23 Baystate Medical, Baystate Health is not a
24 particularly litigious organization. It's a nonprofit
25 organization and is not looking for a fight, and it was

1 willing to allow Bay State Physical Therapy to simply
2 continue in eastern Mass. without paying anything. But
3 the big change is when it leaped to Springfield and just a
4 few miles down the road from the flagship hospital and
5 facility, other facilities by Baystate that provides
6 physical therapy, it opened up Bay State Physical Therapy.
7 It's just a different ball game then because it came right
8 into Baystate's back yard. This is its trade area. This
9 is where --

10 THE COURT: So you had acquiesced -- the
11 negotiations fell apart and they weren't perused after
12 2008 or '9 and so you had acquiesced to them continuing to
13 use the name in the Worcester area and you just left it
14 alone?

15 MR. DUDA: Yes.

16 THE COURT: Did you just leave it alone by
17 agreement or you just decided not to be involved?

18 MR. DUDA: I think it's most accurate to say we
19 decided not to be involved; not to pursue the matter
20 further I think is the way we would describe it.

21 THE COURT: Okay. You've argued to me about the
22 potential for irreparable harm. What about balance of
23 hardships and public policy?

24 MR. DUDA: Well, certainly on the balance of
25 hardships, Your Honor, we're talking about Baystate's core

1 mark. It is its most important mark. If Baystate cannot
2 prevent another entity providing healthcare services from
3 coming into its back yard and using its mark, that mark is
4 going to become meaningless. So we're talking about a
5 critical issue to Baystate to protect that mark.

6 I think the issue of balance or public interest goes
7 right into that, and that is that Baystate's interest is
8 the same as the public's interest. The public needs to
9 know when it goes into a Baystate facility that it's going
10 into a facility that's controlled by Baystate. It's been
11 here for 40 years. It has a reputation. It has -- you
12 know, I think people can certainly trust what they're
13 going to get going into Baystate.

14 I don't really -- I'll let Bay State Physical Therapy
15 counsel address the issue, but the hardship to the
16 defendants appears to be, particularly in light of the
17 hardships to the public and to Baystate Medical, to not be
18 significant. This is a single facility we're talking
19 about affecting, and we're talking about simply not using
20 the Bay State name at that single facility that it opened
21 just a few months ago.

22 THE COURT: So Bay State Physical Therapy
23 started I think started somewhere around 1995. Was
24 Baystate Health involved in the physical therapy business
25 around that time?

1 MR. DUDA: Certainly, Your Honor. Yes, it was.
2 The one indication that we've shown in the exhibit is
3 Wally Garstka there who talks about having cardiac
4 rehabilitation services since his initial procedures back
5 in 1994. And then within a couple of years Baystate had
6 registered the mark Baystate, Baystate Rehabilitation
7 Care, which is a continuation of its physical therapy
8 services.

9 Baystate has provided comprehensive medical services
10 and physical therapy services virtually since its
11 beginning and, in fact, the history of Baystate goes back
12 well before 1976. Its predecessor organization was
13 Women's Wesson Hospital and the like and so physical
14 therapy is not new.

15 THE COURT: I'm sorry, the predecessor
16 organization was what?

17 MR. DUDA: I'm talking a little bit out of
18 school right now, but I believe it was called -- there was
19 Wesson Women's or Wesson, I believe it's Wesson's
20 Medical.

21 THE COURT: Wesson Women's is that what it was?

22 MR. DUDA: I believe.

23 THE COURT: It's just an interesting part of
24 Springfield history that I was trying to remember myself.
25 Okay.

1 MR. DUDA: Anyway it goes way back, and Baystate
2 is the outgrowth of that and the Baystate mark came about
3 after Wesson and another facility were merged.

4 THE COURT: Okay. Tell me about Baystate
5 Health's decision to license the use of its name for
6 things that aren't necessarily involved with Baystate
7 Health System?

8 You don't -- I mean, you're clear you say that's
9 true, you've become involved in licensing agreements with
10 businesses who are doing other work in, to say it
11 generally, the healthcare area allowed them to use
12 Baystate.

13 MR. DUDA: That's correct, Your Honor.

14 THE COURT: Tell me about that.

15 MR. DUDA: Yes, each of those are a trademark
16 license which are not uncommon. Baystate doesn't do it
17 frequently, but, yes, in a few instances licensed use of
18 its trademark. But with each license, as with at least
19 any valid trademark license, the licensor controls the use
20 of the mark and oversees the services or products that are
21 provided by that mark. So that --

22 THE COURT: How do you oversee it? Just give me
23 an example that we can talk about for like Baystate what?

24 MR. DUDA: Well, typically it would be an annual
25 review, a meeting with the other facility and we'd go --

1 THE COURT: Give me the name of one of the
2 facilities that licensed.

3 MR. DUDA: I don't know that offhand. Your
4 Honor, if you don't mind if I ask one of my co-counsel who
5 may have that?

6 THE COURT: Sure.

7 MR. DUDA: Lauren, do you have that or, Mary?

8 MS. BONZAGNI: Baystate Eye is one example.

9 COURT REPORTER: Who is speaking please?

10 MS. BONZAGNI: This is Mary Bonzagni.

11 THE COURT: Thank you. So Baystate Eye. Now
12 where is Baystate Eye located?

13 MR. DUDA: Mary, why don't you answer that
14 question?

15 MS. BONZAGNI: So they're located on
16 Bicentennial Drive in Springfield.

17 THE COURT: Okay. That's the one I was thinking
18 of and they're a license. They have nothing to do with
19 Baystate Health other than they're using the name? In
20 other words, there's no doctors that are specifically
21 affiliated, Baystate Health doctors that work at Baystate
22 Eye; is that correct?

23 MS. BONZAGNI: So there is a requirement in our
24 license agreement that at least one of the doctors has to
25 be affiliated with Baystate Health.

1 THE COURT: Okay. What does that mean,
2 affiliated?

3 MS. BONZAGNI: They have to be -- I'm actually
4 just trying to find the agreement. I think the
5 requirement was that they have to be able to practice
6 within Baystate Health, within the hospital.

7 THE COURT: I see. Okay.

8 Now, what if at Baystate Eye -- and we're talking
9 about the most horrible example possible but it's what
10 we're going through today, COVID-19, someone goes into
11 Baystate Eye for some type of procedure and they contract
12 COVID-19 and it comes out in the media that COVID-19 was
13 passed along at Baystate Eye.

14 Does Baystate Health System get involved in this and
15 try to deal with it and embrace it as this is our problem.
16 We're going to try to make it better. Or do they step
17 away from it saying we have nothing to do with Baystate
18 Eye? This isn't our problem.

19 MR. DUDA: I don't know what the terms of the
20 agreement call for in a situation like that or if the
21 agreement addresses that type of situation, but I would
22 very much mention that Baystate would be involved if one
23 of its licensees had a situation such as that to address
24 the problem.

25 THE COURT: How often is the license subject to

1 review or renewal?

2 MR. DUDA: Mary, is everything licensed?

3 MS. BONZAGNI: This is Mary Bonzagni again. So
4 this is a yearly review and renewal of each license
5 agreement.

6 THE COURT: All right. And Baystate has other
7 doctors. There's a Baystate OB-GYN group. Is there a
8 Baystate Physical Therapy related group that's out there?

9 MS. BONZAGNI: Not that I'm aware of.

10 THE COURT: All right. And how does that affect
11 your argument, the fact that Baystate is willing to
12 license the use of its name for peripheral type of
13 healthcare things? The eye care is a great example to be
14 talking about. What does that do to your argument and the
15 likelihood of success on the merits, strengthen it or
16 weaken it?

17 MR. DUDA: Your Honor, I think given that the
18 license, that it's not a naked license but a license which
19 allows Baystate to oversee the use of the mark and the
20 services provided, I think it strengthens the mark. That
21 is, Baystate is maintaining control of its mark. It does
22 not want to be in a situation where somebody is using its
23 mark without its oversight or some form of control over
24 that.

25 When somebody comes into territory or comes into

1 Baystate's territory and uses the mark without any
2 affiliation, any contracting oversight by Baystate, then
3 that's dangerous.

4 It's not only -- I mean, it's dangerous for the
5 public and it's dangerous for the patients, but it would
6 result or could result in the loss of any rights Baystate
7 has on its mark because it's allowing its mark to be used
8 not as a designator of particular source of services or
9 services that are under its control but allowing it to be
10 used by anybody.

11 So I think there's a very big difference between
12 allowing use of the mark under license and simply allowing
13 the use of the mark, and I think allowing the use of the
14 mark under license is consistent with its control of the
15 mark.

16 THE COURT: So how does that affect -- I mean,
17 obviously I think around our area there's a Baystate Rug
18 and Floor Company or there might have been a Baystate car
19 dealership. Those obviously have nothing to do with
20 Baystate Health Systems so there's no issue there. But
21 what if a Baystate Chiropractic clinic opened up?

22 It was not called -- it was not called Baystate
23 Physical Therapy but it was called Baystate Chiropractic
24 or Baystate Acupuncture, would that make a difference? Is
25 it the physical therapy issue that you think is the real

1 link into your healthcare system?

2 MR. DUDA: Baystate has registered its mark for
3 healthcare services and that describes the scope of the
4 services that it provides under its common law rights
5 also.

6 Baystate provides alternative medicines under its
7 mark. It provides a wide range of healthcare services so
8 I think if any service is, you know, properly
9 characterized as a healthcare service or physical therapy
10 or chiropractic, acupuncture, it would -- any type of
11 service involving the provision of healthcare services to
12 individuals I think that falls under the Baystate mark and
13 a category that it needs to protect. It doesn't need to
14 protect carpets or car dealerships. Clearly consumers
15 know the difference between cars and healthcare
16 services.

17 THE COURT: Give me one second. For some reason
18 I lost maybe 20 seconds there.

19 MR. DUDA: I'm sorry.

20 THE COURT: And I think it's my issue. I don't
21 know what's going on. It hasn't happened before with the
22 phone I'm using.

23 My question had to do with where you started to
24 answer as to would it be different if it was Baystate
25 Chiropractic or Baystate Acupuncture, and you started to

1 answer saying, well, Baystate Health Systems is involved
2 in alternative medical things. So I really wanted to know
3 is it the physical therapy issue? Do you treat
4 chiropractic and acupuncture the same way and you started
5 to answer that.

6 MR. DUDA: Yes, and what I was indicating would
7 be the registration for the Baystate trademark is for
8 healthcare services, and that that accurately describes
9 the scope of services for which the mark designates under
10 common law in western Massachusetts.

11 That Baystate offers a wide range of services, of
12 healthcare services under its mark including alternative
13 type medicines. And that any type of healthcare service,
14 whether it be chiropractic, acupuncture, midwifery,
15 cardiac care, physical therapy that has to do with the
16 care of individuals, that would fall under the mark and
17 Baystate would seek to protect that. There's a
18 distinction, as I was pointing out, between that and car
19 dealerships or banks or something like that --

20 THE COURT: Sure.

21 MR. DUDA: -- that's clearly not medical care or
22 healthcare.

23 THE COURT: So Baystate Health argues that Bay
24 State Physical Therapy was in bad faith; was exercising
25 bad faith when they came to the Springfield area using the

1 Bay State name trying to capitalize on the goodwill
2 towards Baystate Health Systems to help them financially
3 and get a foothold here and you're saying that would have
4 been bad faith.

5 How do you make -- how does that argument really hold
6 up if Bay State Physical Therapy has been running this
7 business with that name out in the Worcester/Boston area
8 for as long as they have not relying upon Baystate Health
9 in any way to get a boost for their business?

10 MR. DUDA: Well, it certainly knew that -- or I
11 think one can properly assume and I think it's not an
12 illogical question to conclude that they knew that
13 Baystate is a well known mark for healthcare services in
14 the Springfield area and western Massachusetts. And that
15 it just seemed to defy any type of business judgment that
16 you would move into an area with the same mark and not
17 recognize that there's going to be some leverage off of
18 that.

19 THE COURT: Right, but they have been growing.
20 Their business has been successful in the Worcester and
21 Boston area and so they're growing to the point of now
22 they're covering the whole state. Quite frankly, they
23 want to cover the whole baystate.

24 There's another term baystate meant something else
25 before it meant Baystate Health Systems. It is a

1 reference to our state that people understand and have
2 been using for quite some time, and so they've been
3 successful and they're growing their business.

4 I don't know how I infer from this that they were
5 plotting to -- at a time growing their business out east,
6 plotting for a time when they could -- when would be the
7 right time for them to capitalize on Baystate Health
8 System by coming to the Springfield area and maybe pushing
9 out into the Berkshires. I'm not getting the bad faith
10 there.

11 MR. DUDA: Well, Your Honor, I'm not suggesting
12 that it's to that extreme that there's been some sort of
13 plot that's been developing over the years, but I think
14 the point was that they had to know that there is going to
15 be likelihood of confusion.

16 They had to know that there was leverage coming off
17 this, and to me this was an effort to, well, we're coming
18 in anyway and we'll see what happens. You know, if that's
19 not bad faith, it's certainly a calculated step with the
20 knowledge that confusion was likely to occur.

21 THE COURT: Right. But, Attorney Duda, they're
22 coming in. They're growing their business. Like, good
23 for them. Their business is that good; they're growing
24 their business. They're coming in after Baystate Health
25 Systems just let the issue drop in 20008. It just wasn't

1 pursued about trying to draw some type of line of
2 demarcation where you would be happy with them sitting on
3 one side of the line and you staying on the other side of
4 the line.

5 And then it seems -- tell me if I'm wrong, but it was
6 never brought up again for all these years about trying to
7 renew that, hey, how's everything going? We're just
8 making sure you're not planning to come to the Springfield
9 area. That was just dropped in 2008.

10 One of the things Bay State Physical Therapy is going
11 to tell me is that you let that happen for so long never
12 giving any indication that Bay State Physical Therapy
13 shouldn't try to expand their business and that you would
14 bring this issue up if they did try.

15 MR. DUDA: Well, Your Honor, I suppose they
16 could make that judgment call. I'm not -- I don't know
17 what kind of judgment they made. All we know is that we
18 had discussions back in 2008 about that. Baystate made
19 clear what its concern was, what its area of protection
20 was. They offered to do a license for payment that Bay
21 State Physical Therapy didn't accept that. The
22 discussions dropped and there was no further effort to
23 move west and that was fine with Baystate.

24 Now whether Baystate could have contacted them
25 periodically to check on what their plans were, I think

1 that would have been an unusual step from a business
2 perspective since there was no indication that they
3 intended to move into the Springfield area -- into the
4 western Massachusetts area. They had been for years in
5 eastern Massachusetts and Baystate was willing to let that
6 go.

7 THE COURT: Right. But there could clearly have
8 been some type of injunctive relief requested or some type
9 of relief request based upon where they were and your
10 argument -- your conversations breaking down about them
11 using it.

12 You thought they were using your name back then as
13 well. And, quite frankly, just because there's a
14 Worcester -- there's a Hampden County line that ends at
15 Worcester, you know, that line is blurred. It doesn't
16 really mean that people in the Worcester area haven't
17 heard of Baystate Health Systems.

18 You know, people in the Springfield area have heard
19 of Mass. General Hospital Systems, and people out in
20 Boston have heard of Baystate Health Systems.

21 My point is that you just let it go and you just let
22 them continue without doing anything. So when I'm
23 assessing likelihood -- I mean, likelihood means something.
24 Likelihood of success on the merits, that means something.

25 Clearly you may end up prevailing and winning on your

1 ultimate underlying suit, but I have to make a finding
2 that you are likely and here I'm looking at this issue of
3 you just allowing -- Baystate Health allowing this to
4 happen over all these years. To me it seems like the
5 weakest part of your case and so I'm giving you a chance
6 to address it again.

7 MR. DUDA: Well, to bring it back to what our
8 case is we're talking about western Mass. and that there's
9 common law rights that have been established in this area,
10 in this trade area. Those rights were not waived by
11 discussions with Bay State Physical Health in 2008. They
12 weren't waived by allowing Bay State Physical Health to
13 continue to operate for years in eastern Massachusetts.
14 That's the reality and that they weren't here in this
15 territory and that's --

16 THE COURT: But you didn't allow them to
17 operate. You didn't -- you didn't do anything. You had
18 no control. You did not allow them to operate. They
19 operated on their own. That's something separate, apart,
20 and aside using the same name. It wasn't because you
21 allowed them to do it. They just did it.

22 You didn't take any legal action to stop them from
23 coming into your area or using your name in the Worcester
24 area. And it's just I don't buy that it's on the
25 Worcester area there's such a line of demarcation that no

1 one has ever heard of Baystate. Of course, they have.
2 Everyone has heard of Baystate Health Systems throughout
3 this entire state.

4 So, you know, could just coming over from Worcester,
5 I don't know that you needed to allow it or have the right
6 to disallow it because you ignored it.

7 MR. DUDA: If I used the word "allow," I don't
8 -- perhaps that's the wrong word. But again, what we did
9 not allow and what did not happen is their operation in
10 our trade area.

11 People may have heard of Baystate out in eastern
12 Mass. but that's not Baystate's trade area; that's not
13 where its market is; that's not where the consumers are
14 that are using Baystate services, and it's not the
15 consumers that are going to be confused by Bay State
16 Physical Therapy providing services in Baystate's own back
17 yard right now, and at this time it's a critical time to
18 stop that.

19 Maybe whatever happened in eastern Mass. happened in
20 eastern Mass. and that may be a part of this litigation,
21 but right now we're talking about this area where I think
22 it's clear that Baystate has established its common law
23 rights to the use of the mark and it's this trade area.
24 This is the trade area we're talking about.

25 We're not -- in the same way in the Thrifty

1 Rent-A-Car v. Thrift Car case, Thrift Car had rental cars
2 in Nantucket or had people going out in that area and the
3 court said, well, no, we're not going to protect there and
4 that's not an issue. Thrifty National Car Rental could
5 take that territory, but East Taughton that is Thrift
6 Cars' area. That's their core area. That's where their
7 consumers are and they are going to protect it. We're
8 going to stop Thrifty Car from going in there, and the
9 same thing with Dorpan with the Melia Hotel there. It's
10 the same idea.

11 It still goes back to protecting consumer confusion
12 and that's the point. This isn't -- you point out this
13 isn't just a matter of a property right or a patent or a
14 copyright where we can get damages later on.

15 This is the use of a mark and what it means to
16 consumers so that they don't get confused about a mark in
17 this area. I don't think the fact that whatever happened
18 in eastern Mass. during negotiations or we didn't pursue
19 things out there affect the fact that people are going to
20 be confused here and now --

21 THE COURT: Well, again, Attorney Duda, I'm just
22 doing my analysis here just based on the facts for
23 injunctive relief.

24 MR. DUDA: I understand.

25 THE COURT: And I agree -- I think I agree the

1 most with the arguments you made as to this liklihood of
2 confusion. I think there is some likelihood of confusion
3 just by hearing the name phonetically. You just hear it
4 and the first thing you think of is -- I mean, in the best
5 sense Baystate Health wants to think the best thing you
6 think of is the integrity of Baystate Health Systems and
7 someone would choose that physical therapy place thinking
8 that the integrity of Baystate Health Systems is standing
9 behind it. I think that's a good argument.

10 All right. What else do you want to say before we
11 move on to Bay State Physical Therapy's argument?

12 MR. DUDA: I think that's it, Your Honor. I
13 think we've covered everything. Thank you very much.

14 THE COURT: All right. Thank you.

15 Is it Attorney Wheatley for Physical Therapy?

16 MS. WHEATLEY: Yes, Your Honor. This is Lucy
17 Wheatley for Physical Therapy. I thought I would just go
18 through some of the points that Mr. Duda made and Your
19 Honor made in his argument that I think are important to
20 clarify.

21 Mr. Duda pointed to the Thrifty Car Rental case and
22 the Dorpan v. Hotel Melia case as being authority here and
23 suggested, you know, that the court should disregard the
24 prior Baystate cases which we think are certainly on
25 point.

1 There's important facts recognized about the Thrifty
2 Car case. First, in that case likelihood of confusion was
3 conceded and those parties' rights -- so those parties'
4 rights to their respective marks were not challenged
5 except with respect to the geographic scope of those marks
6 and whether an injunction was appropriate.

7 Likelihood of confusion is not conceded here; nor is
8 Baystate Health's right to use their mark, prior rights to
9 use their mark with physical therapy conceded here. Both
10 Dorpan and Thrifty Cars did not involve a geographically
11 descriptive mark and that is a key distinguishing factor
12 because when you choose to use a mark like Baystate, which
13 is a common nickname for Massachusetts, you have a higher
14 burden. You have to prove secondary meaning and you have
15 to prove secondary meaning prior to the alleged offenders'
16 first use of that mark.

17 My client's first used their trademark Bay State
18 Physical Therapy in 1995. Plaintiff has not put forth any
19 evidence whatsoever that shows secondary meaning prior to
20 that date and, frankly, they have not put forward enough
21 evidence to show secondary meaning period.

22 Normally --

23 THE COURT: They're telling me -- Attorney Duda
24 is telling me they were involved in the respiratory
25 therapy/physical therapy field going back that far.

1 MS. WHEATLEY: Yes, Your Honor. I wanted to
2 address that. The lone piece of evidence they provided on
3 that was their Exhibit 38, which is a 2019 article about a
4 man who received heart surgery at Baystate Hospital and it
5 mentions he had one surgery in 1994 and that he received
6 cardiac rehabilitation services.

7 Mr. Duda says the court should just assume that means
8 he got physical therapy and that Baystate Health was using
9 its mark in connection with physical therapy. I would
10 submit that an article that doesn't even mention the term
11 physical therapy and is talking about heart surgery
12 absolutely is not sufficient to prove common law rights in
13 Baystate in connection with some physical therapy.

14 The other piece of evidence Mr. Duda directed you to
15 was a state trademark registration from 1999. It is
16 notable that that state trademark registration claims a
17 first use date in connection with physical therapy in
18 1996, which would be after my client's first use in 1995
19 which would mean my client and not Baystate Health has
20 prior rights in physical therapy.

21 So this evidence here is certainly not sufficient to
22 establish common law rights in connection with physical
23 therapy and, as Mr. Duda concedes, that's the burden they
24 have to meet here. They have to prove these common law
25 rights in connection with the services they are

1 challenging Bay State's use with.

2 THE COURT: So is Bay State Physical Therapy the
3 type of physical therapy that I'm envisioning that after
4 you have knee surgery, you have shoulder surgery, you have
5 some type of injury and you need to strengthen a joint, a
6 bone, a muscle, a ligament, et cetera, that's where you
7 go? Or does Bay State Physical Therapy are they involved
8 in things like respiratory therapy, which seems like a
9 specialty in and of itself?

10 MS. WHEATLEY: So they have free-standing
11 locations and they also are located in YMCA gyms. On
12 their website the list of services is "cupping, dry
13 needling, IASTM, kinesio taping, manual therapy." The
14 areas of specialty are "aquatic therapy, chiropractic
15 services, dance medicine, occupational therapy" --

16 COURT REPORTER: A little slower please.

17 MS. WHEATLEY: I apologize. "Parkinson's,
18 pediatric sports industry -- injuries, pediatric physical
19 therapy, pelvic women's health, post-concussion therapy,
20 vestibular therapy."

21 So I don't see anything that would relate it to
22 either respiratory therapy or, you know, cardiac services.
23 This is a fairly distinct field and particularly the
24 location in gyms gives you an idea of the type of physical
25 therapy they specialize in.

1 THE COURT: Attorney Wheatley, where is it
2 located in Springfield? Now where are they located?

3 MS. WHEATLEY: They are at 1739 Allen Street. I
4 could not tell you where that is in relation to Baystate
5 Health, though I would point out that Bay State Physical
6 Therapy has been outside of the greater Boston area for
7 some time. They have locations in Westborough, Franklin,
8 Providence, North Attleborough. All of those locations
9 are under 60 miles from Springfield, much less Baystate
10 Health's other locations.

11 Another point Your Honor raised was whether Baystate
12 Health has locations in the Boston area and Mr. Duda said
13 they had reference laboratories. I think he said they
14 didn't provide medical services. These laboratories are
15 consumer spacing laboratories where patients go to get
16 blood draws and seek tests and so I would certainly say
17 that is a medical service.

18 It's a consumer spacing medical service, and so
19 Baystate Health and Bay State Physical Therapy have been
20 side by side in Boston for many years without apparent
21 harm or confusion, which I would also say suggests that
22 Baystate Health has acquiesced to Bay State Physical
23 Therapy's use and that there is no urgency here or
24 irreparable harm to issue a preliminary injunction.

25 An additional point I wanted to address that was

1 brought up was the issue of the other Baystates in the
2 healthcare field. Certainly Baystate is an extremely
3 common name and there are I think thousands of Baystates
4 in Massachusetts. There are also many Baystates in
5 Springfield. They are also other Baystate medical
6 practices in Springfield.

7 Defendants we pointed out these other Springfield
8 Baystates and defendants bore the burden to show that
9 those did not weaken their rights. What they provided
10 were very heavily redacted license agreements. It's
11 impossible to tell because of all the redactions whether
12 these are actually valid licenses, but what we can see is
13 that all three of these licenses were created in the
14 context of each of these practices using Baystate on their
15 own and Baystate Health accused them of infringement and
16 then they signed this agreement.

17 So there's no indication that Baystate Health
18 actually controls these locations and, in fact, they use
19 different logos and they are not listed on the Baystate
20 Health web page as Baystate Health locations. So I think
21 it's very telling that Baystate Health even in Springfield
22 has apparently tolerated other Baystates.

23 THE COURT: Well, they're telling me that the
24 licensing agreements -- I mean, that's true. I think they
25 are tolerating it, but they're tolerating it they tell me

1 under a licensing agreement that at least gives Baystate
2 Health some type of control including having someone in
3 the organization using their name have to have practicing
4 rights at Baystate Health.

5 And in answer to the question, well, what if one of
6 these Baystate Eye Care or Baystate something else, what
7 if someone -- what if it was in the media that someone
8 contracted COVID there, would Baystate Health Systems be
9 concerned and get involved in it? Attorney Duda said,
10 yes, he thinks Baystate Health would be involved. That
11 shows some degree of oversight and control and them being
12 involved in the licensing, at least that's the argument
13 being made by the attorney.

14 MS. WHEATLEY: Yes, Your Honor, and I agree that
15 was the argument made by the attorney though since they
16 failed to actually provide the unredacted license
17 agreement that would indicate whether that is in fact the
18 case, I don't think they have proved that.

19 And the fact that these were free-standing existing
20 locations for many years prior to allegedly becoming
21 licensees at the very least shows that consumers in the
22 Springfield area are used to there being multiple
23 Baystates within the healthcare field quite recently.
24 These licenses are all from 2005.

25 THE COURT: Okay. That's a good point.

1 Did you give me -- is there evidence -- I didn't look
2 at this last night so I don't know. Did you give me
3 pictures of your logos and your lettering and your color
4 scheme and all that for comparison to Baystate Health?

5 MS. WHEATLEY: We provided a copy of our
6 incontestable federal trademark registration which does
7 show the logo that Bay State Physical Therapy uses and
8 that's the logo that they are using on the Springfield
9 location. Baystate Health also provided a copy of Bay
10 State Physical's Therapy web page and so that pretty
11 accurately shows the way the mark is used.

12 I would note again the fact that Bay State Physical
13 Therapy is the only party here who has an incontestable
14 trademark registration in connection with physical therapy
15 is very significant.

16 Ordinarily that provides us with a conclusive
17 evidentiary presumption of the exclusive right to use.
18 The only way to overcome that is to prove prior common law
19 rights, which means that Baystate Health faces the heavy
20 burden here. They have to prove this and the evidence
21 they've put forward just does not even come close. They
22 have not in fact --

23 THE COURT: Just because I'm curious -- I think
24 I know what the answer is -- but is there anything on your
25 website or your paperwork or your patient sign-in

1 information, you know, when you have to go there and you
2 have to write all your information before you're seen, is
3 there anything that says Bay State Physical Therapy is not
4 affiliated with Baystate Health Systems?

5 MS. WHEATLEY: No, Your Honor. I don't believe
6 there is and, frankly, I would say that there's never been
7 any indication that's necessary both because Baystate is a
8 very common name but also because Bay State Physical
9 Therapy has existed since 1995. It has 60 locations.
10 It's also outside of Massachusetts, and as part of the
11 evidence actually that plaintiffs produced Bay State
12 Physical Therapy shows up first on the Google result if
13 you Google Bay State Physical Therapy. So to the degree
14 anyone has secondary meaning in the mark Baystate, I would
15 suggest it is Bay State Physical Therapy. It's quite well
16 known.

17 The idea of sort of that these are in significantly
18 different geographies, I mean, first as you pointed out,
19 they do have locations in Boston and so they're not
20 actually in different geographies. But the distances here
21 we're talking about everyone here is within less than a
22 hundred miles of each other.

23 The Thrifty Rent-A-Car case, for instance, initially
24 involved a remote junior user who was in Oklahoma or the
25 Thrifty Rent-A-Car was in Oklahoma and the junior user was

1 in Massachusetts. That's not what happened here.
2 Everyone here was operating in Massachusetts at the same
3 time together for over 25 years.

4 THE COURT: Is there presently a Baystate
5 Physical Therapy? Maybe there's one at the hospital or
6 maybe some satellite offices. Is there a Baystate
7 Physical Therapy?

8 MS. WHEATLEY: I'm sorry?

9 MR. DUDA: I'm sorry, is there something that's
10 called Baystate Physical Therapy?

11 THE COURT: Right.

12 MR. DUDA: Mary, I don't know what the names
13 are. We have a number of facilities that provide physical
14 therapy. I'm not sure what --

15 THE COURT: Or Baystate Rehab; Baystate Rehab
16 Services, something like that?

17 MR. DUDA: Mary Bonzagni, could you answer that?

18 MS. BONZAGNI: So there is a Massachusetts state
19 registration for Baystate Rehabilitation Care which we've
20 already mentioned.

21 MR. DUDA: And that's since 1999.

22 MS. BONZAGNI: The first use date I think of
23 1996, and that date was the date in which that word mark
24 was used on physical therapy type services.

25 I know that what we had argued in the past is that

1 these types of services were offered by Baystate within
2 their hospital setting and so that would be physical
3 therapy services offered under the Baystate brand.

4 THE COURT: So arguably Attorney Wheatley would
5 say that if you did open a satellite, a group of satellite
6 or standalone physical therapy locations and said this is
7 Baystate Physical Therapy doing sports medicine type
8 physical therapy after knee surgery at Baystate, then
9 arguably Attorney Wheatley would say you would need the
10 permission of Bay State Physical Therapy to do so. Would
11 be that right, Attorney Wheatley?

12 MS. WHEATLEY: Yes, Your Honor. And I just
13 looked at the Baystate Health website and they do seem to
14 use Baystate Rehabilitation Care as their name.

15 THE COURT: I'm not seeing how that's exactly
16 the same as physical therapy. Is that my problem? Am I
17 missing something? Why am I just not seeing that it's the
18 same?

19 MR. DUDA: For trademarks when you just tag on a
20 generic term like physical therapy essentially adds
21 nothing to the demarcation. The fact that it's Baystate
22 Physical Therapy or Baystate Rehabilitation Care is not
23 the point. The point is that it's Baystate and Baystate
24 covers healthcare services which includes physical therapy
25 and very much includes services that the defendants --

1 THE COURT: But it's a type of healthcare I'm
2 not sure Baystate Health Systems has been involved in.

3 I just don't see rehabilitation -- when I think of
4 rehabilitation services, I think that when you've had --
5 let's talk about heart surgery. When you've had
6 open-heart surgery or you've had some type of major
7 surgery and you need to go to a location and be rehabbed
8 essentially and stay there and need some intense
9 rehabilitation, that's where you go.

10 I don't think of rehabilitation in that sense being
11 located in gyms and at the Y and, you know, offering
12 instructions about what you do after you work out and what
13 type of workouts. I'm just seeing a difference. I'm
14 happy to consider otherwise and consider your argument
15 that I'm mistaken, but I'm just seeing Baystate
16 Rehabilitation different from Bay State Physical
17 Therapy.

18 MR. DUDA: Your Honor, the description that Bay
19 State Physical Therapy provides for the services provided
20 by its mark is "physical therapy evaluation,
21 identification, and management of movement dysfunction to
22 restore, maintain, and promote optimum physical function
23 preventing the onset symptoms and progression of
24 impairments, functional limitations, and disabilities
25 resulting from disease, disorders, conditions, or

1 injuries."

2 That is what Baystate provides and we submitted an
3 affidavit, which I don't think was contested, from Mr.
4 Woodly that states precisely that those services are
5 exactly in the scope of Baystate's services and has been
6 for several decades.

7 THE COURT: Okay.

8 MR. DUDA: So we're not in two different worlds
9 here. We're in one in the same world. Baystate provides
10 physical therapy services, whether you want to call it
11 rehabilitation or the like.

12 I think the evidence in the record would substantiate
13 that indeed we provide what Bay State Physical Therapy
14 itself describes as its services. We provide every one of
15 those and fits the description of services provided under
16 the trademark and describes the services that we provide
17 and that's supported by affidavit.

18 THE COURT: Okay. Attorney Wheatley, we'll pick
19 back up with you and what do you want to say about -- do
20 you want to start touching on the likelihood of success on
21 the merits and the irreparable harm issue?

22 MS. WHEATLEY: Yes, Your Honor.

23 So with respect to likelihood of success on the
24 merits, I think the most salient point is that for the
25 same reasons that there was no success in the prior

1 Baystate cases, Baystate here is not going to be able to
2 show secondary meaning prior to my client's first use of
3 Bay State and fundamentally that means they cannot win
4 their case. And frankly in the other Baystate case there
5 were consumer surveys on the record. There was much more
6 persuasive evidence and we have none of that here.

7 And just to address Mr. Duda's point about the
8 services and that's with respect to what is on the record,
9 Mr. Duda agrees here that we are in the realm of common
10 law rights. The description he read was from our
11 incontestable trademark registration for physical therapy
12 which we rely on but Mr. Duda bears the burden to show use
13 of his mark, of his client's mark in connection with those
14 particular services and there is no evidence of that on
15 the record. There really isn't.

16 The one article they direct you to, Exhibit 38,
17 doesn't -- it talks about cardiac rehabilitation care
18 which, to my knowledge, my client doesn't offer. It does
19 not seem to me the sort of thing you would get at a gym.
20 So I do believe that these are distinct services and again
21 since we have the incontestable trademark registration, it
22 is Baystate Health's burden to prove their common law
23 rights and our exact services and they haven't done that.

24 The other main point on likelihood of success on the
25 merits is the acquiescence and *Laches* issue here. This

1 issue was first raised in 2008. So Baystate Health had
2 notice of my client's activities at least as early as
3 2008, and we've produced the complete correspondence
4 between the parties.

5 In 2008 Bay State Physical Therapy strongly contested
6 that Baystate Health had rights to stop my client from
7 using the mark Bay State Physical Therapy. They wanted to
8 avoid litigation so they did consider entering into some
9 sort of agreement and then ultimately the negotiations
10 dragged on for over a year. Ultimately they decided not
11 to enter an agreement and Baystate Health recognized that.

12 They actually sent a letter where they said "Where we
13 have not received a response to our letter to you dated
14 May 21, 2009, we assume that Bay State Physical Therapy of
15 Randolph is no longer willing to resolve the above
16 referenced matter by entering into a license agreement
17 with Baystate Health. Please confirm that our
18 understanding is correct."

19 So they very clearly understood that there was no
20 agreement and that my client did not agree to do anything,
21 and then in the intervening 12 years my client opened 40
22 locations. There was rapid expansion here.

23 My client also secured a federal trademark
24 registration for Bay State Physical Therapy which gave
25 them nationwide rights that Baystate Health did not

1 oppose. Not only did they not oppose it, they let it go
2 incontestable.

3 So there's significant acquiescence here and while
4 this is my client's first location in Springfield, it is
5 not their first location outside of Boston. They've been
6 steadily expanding westward and Baystate Health just sat
7 on its hands and let them do that and let them invest more
8 and more in this trademark.

9 So I don't think they can overcome acquiescence and
10 *Laches* and ultimately win on the merits here and
11 particularly not with respect to the trade area they
12 demand which is all of western Massachusetts.

13 Frankly based on the -- the trade area they ask for
14 would basically put them 75 miles out into western
15 Massachusetts from Springfield. Well, if you do 75 miles
16 out from my client's preexisting locations, which they do
17 not challenge, you're in Springfield. So I would say the
18 trade areas already overlap here. They've overlapped for
19 some time and that also further means they cannot succeed
20 on the merits.

21 With respect to the irreparable harm prong,
22 defendants did not put forth -- they put forth attorney
23 argument. They did not put forth any evidence of
24 irreparable harm. They didn't even put forth a client
25 declaration attesting to irreparable harm, and again this

1 is their burden and they're the one seeking to change the
2 status quo here.

3 For there they have to make a showing of harm and
4 they have not done so, and the long, long delay certainly
5 undercuts any harm. And requiring my client to take
6 in-person action in the midst of a pandemic certainly
7 creates harm for my client and it also means that my
8 client's customers who are familiar with the Bay State
9 Physical Therapy brand, because it is throughout
10 Massachusetts and it is a well-established brand that has
11 a website, are not going to be able to find the
12 Springfield location which is a serious harm in itself.

13 I would also say on the delay even if we're only
14 talking about Springfield, there's still been an
15 eight-month delay and a number of courts have found that
16 even an eight-month delay is enough to justify denying a
17 motion for preliminary injunction.

18 THE COURT: All right.

19 Okay. Attorney Duda, did you want to respond
20 briefly?

21 MR. DUDA: Yes, Your Honor. There's so much
22 there.

23 First of all, what it seems is suggested by defense
24 counsel flies in the face of the First Circuit precedent
25 of Thrifty Rent-A-Car suggesting that somehow Thrift Car

1 was supposed to have brought a lawsuit against Thrifty
2 Rent-A-Car earlier than when Thrifty Rent-A-Car came into
3 their territory, it's just not the law.

4 The fact of the matter is that we're talking about a
5 specific trade area, western Massachusetts, and the rights
6 to a trademark in that area. The rights to that trademark
7 are not waived by not enforcing it outside of that trade
8 area. This is the trade area.

9 The fact that there may be reference laboratories in
10 eastern Massachusetts does not impact the fact that the
11 trade area that we're concerned about is western
12 Massachusetts and this is where the harm is going to be
13 done and there's going to be harm to individuals and harm
14 to Baystate if Physical Therapy is allowed to use the mark
15 in this area, number one.

16 Number two is counsel repeatedly refers to Bay State
17 Physical Therapy having an incontestable mark. The
18 Baystate mark has been incontestable for much longer than
19 Bay State Physical Therapy. Baystate has been an
20 incontestable registered mark for some time. That's a
21 different issue than what we're trying to get at here,
22 what we're trying to talk about the local area.

23 The fact that it's 75 miles from Springfield
24 measurement is irrelevant. We're not talking about a
25 single facility in Springfield. We're talking about

1 facilities throughout western Massachusetts where Baystate
2 has established healthcare facilities.

3 Finally this idea that we waited eight months is just
4 not correct. We have indicated in our filings we found
5 out in November. There's a couple months of discussions.
6 The lawsuit was filed in March and a preliminary
7 injunction motion was filed in April. We moved as quickly
8 as we can to try to prevent the harm that's happening
9 right now in this area, Your Honor.

10 And finally on the physical therapy being
11 indistinguishable or being distinguishable from healthcare
12 services, I just think it flies in the face of definition
13 of healthcare services. It flies in the face of the way
14 they describe their own physical therapy services.

15 That the issue is not whether we can break it down
16 somehow by what our thoughts are on what happens in a gym.
17 What is important is what a typical consumer is going to
18 understand. When they see Bay State Physical Therapy, the
19 idea is that that's Baystate and it's physical therapy.
20 It's within healthcare services and the likelihood of
21 confusion I think is high. We've shown some evidence of
22 that already happening, and as we indicate in our brief
23 even the slightest amount of actual confusion evidence is
24 very persuasive. It's happening.

25 Your Honor, I'll leave it at that. I'd just ask the

1 court to please consider the potential harm that's going
2 to happen not just to Baystate but to the community if
3 this is allowed to go on.

4 THE COURT: All right. Attorney Wheatley, do
5 you want to take 30 seconds? You don't have to but if you
6 just wanted to wrap up.

7 MS. WHEATLEY: Thank you, Your Honor.

8 Just a couple of brief points. One, back to the
9 Thrifty Car case, again that involved a remote junior user
10 who did not have an incontestable trademark registration.
11 I won't get too much into the technicalities and again
12 where likelihood of confusion was conceded but it was a
13 very different case and the parties did in fact come into
14 conflict as soon as they were both in Massachusetts. They
15 started off in Oklahoma versus Massachusetts so, you know,
16 that was a different situation.

17 Second, on the point of Baystate Health having an
18 incontestable trademark registration, the registration is
19 not -- or an incontestable registration is not for
20 physical therapy services. And more to the point, the
21 fact that both parties were able to secure registrations
22 from the USPTO indicates that the USPTO does not think
23 there is a likelihood of confusion here, which is
24 persuasive evidence that a preliminary injunction should
25 not be issued.

1 Defendant -- plaintiff has also not produced any
2 authority that trademark rights should be divided up town
3 by town within the state of Massachusetts, and they
4 haven't really produced any evidence explaining how the
5 court is supposed to delineate the trade areas here given
6 the distances are so close.

7 And just the final point I would raise is the
8 plaintiffs conceded they're talking about common law
9 rights. To prove -- and Attorney Duda has said they have
10 common law rights in all healthcare services. That is
11 something that they have to prove.

12 They actually have to show prior use in connection
13 with the services they are talking about. They can't rely
14 on a registration that simply says healthcare services.
15 And there is no record -- evidence on the record that the
16 court could use to make the determination that they have
17 made that showing and so we would submit that the
18 injunction should be denied. Thank you.

19 THE COURT: All right. Okay. To all parties,
20 thank you very much for your written materials and for
21 your arguments. The matter is under advisement.

22 MR. DUDA: Thank you, Your Honor.

23 MS. WHEATLEY: Thank you.

24 THE COURT: All right.

25 **(Hearing concluded at 10:39.)**

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2 any reproduction of this transcript, unless under the
3 direct control and/or supervision of the certifying
4 reporter. I assume no responsibility for the accuracy of
5 any reproduced copies not made under my control or
6 direction.)

7 CERTIFICATION

8 I certify that the foregoing is a correct
9 transcript of the record of proceedings in the
10 above-entitled matter to the best of my skill and ability.

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12
13 /s/ Alice Moran
14 Alice Moran, RMR, RPR
15 Federal Official Court Reporter
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February 24, 2021